No. 93-7

In The

Supreme Court of the United States

October Term, 1993

AMERICAN DENTAL ASSOCIATION,

Petitioner,

v.

ROBERT REICH, SECRETARY OF LABOR, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONER'S REPLY BRIEF

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Respondents' arguments highlight why this Court should grant the petition. Respondents concede that the Court has not resolved one of the issues presented by the petition; that issue is ripe for resolution in this case. Respondents also acknowledge a split in the Circuits on another issue; that issue should likewise be resolved here.

Respondents do not even defend the bloodborne pathogens rule solely on OSHA's findings, which the Court of Appeals accepted in deference to OSHA. The rule, however, stands or falls on OSHA's findings that the hepatitis B virus presents a significant risk to workers

and that the requirements of the rule are necessary to protect workers from that virus. The rule cannot be sustained on that basis. The Court of Appeals grossly misapplied the standard of review by deferring to OSHA.[1]

I. The Court Should Grant The Petition To Resolve The Question Whether OSHA May Ignore The Most Cost-Effective Measures Capable Of Abating The Risk To Workers.

Respondents concede that this Court's decision in *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 513 n.32 (1981), reserved the question whether OSHA may ignore more cost-effective regulatory alternatives that would achieve a reduction in risk comparable to the standard adopted. Opp. 19. This case squarely raises that issue.

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[1] Respondents contend (Opp. 22-23) that the questions presented do not fairly include OSHA's failure to consider the law requiring the States to adopt and enforce the CDC guidelines for preventing transmission of HBV and HIV. Pub. L. No. 102-141, § 633, 105 Stat. 876 (1991). The ADA properly raised that fact in support of the first and second questions.

The first question focuses on the requirement that OSHA find a significant risk to workers before issuing a standard. Existing regulatory controls are an essential consideration when evaluating the risk to workers, particularly in this case because the law requiring States to enforce the CDC guidelines postdates the evidence on which OSHA based its finding that HBV presents a significant risk to workers. Pet. 10-11.

The second question focuses on whether OSHA may ignore more cost-effective alternatives to the standard adopted. That question fairly includes the ADA's argument that the most cost-effective remedy for HBV is State enforcement of the CDC guidelines combined with HBV vaccination. Pet. 13-14.

OSHA ignored the federal law requiring the States to enforce the CDC guidelines. In light of that law, OSHA should have adopted nothing more than a mandatory HBV vaccination program. Respondents do not dispute that a mandatory HBV- vaccination program, combined with State enforcement of the CDC guidelines, would be far more cost-effective than the final rule. Nonetheless, Respondents offer three justifications for OSHA's rejection of mandatory HBV vaccination.

First, Respondents note that "HBV vaccination is not entirely effective." Opp. 19. That argument misses the point, which is that vaccination is the most effective means of preventing the spread of HBV. OSHA found that the HBV vaccine is 96% effective. Pet. App. 91a. In contrast, OSHA concluded that the final rule would prevent only 87% of illnesses and deaths caused by hepatitis B. *See* 56 Fed. Reg. 64,004, 64,058/2 (1991).[2]

Second, Respondents state that "the workplace controls will provide substantial protection against infection by HIV and other bloodborne pathogens" besides HBV. Opp. 20. That justification is improper because OSHA did not find that pathogens other than HBV pose a significant risk to workers. Pet. App. 93a; *see Industrial Union Dep't, AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 642-43

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[2] The 87% efficacy rating is based on an assumption that only 50% of workers subject to the rule will voluntarily take the HBV vaccine. 56 Fed. Reg. at 64,057/3.

The residual risk after HBV vaccination is insignificant. According to OSHA's estimates, a vaccinated health care worker's annual risk of hospitalization due to HBV is one in 200,000 and the annual risk of death is one in 500,000. Pet. 7 n.6.

(1980). In any event, compliance with the CDC guidelines will protect workers from pathogens other than HBV.

Third, Respondents argue that OSHA made a policy choice to allow workers to reject the vaccine "for medical, religious, or other reasons." Opp. 20. Respondents ignore this Court's holding in *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), that mandatory vaccination programs do not violate the Constitution.

Respondents' arguments concerning OSHA's failure to consider the mandatory CDC guidelines (Opp. 24-25) are improper post-hoc rationalizations. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 50 (1983). Respondents cannot repair OSHA's error with new arguments on appeal.[3]

Recently, the Department of Labor concluded that the Occupational Safety and Health Act requires OSHA, when promulgating an occupational safety standard under section 6(b), 29 U.S.C. § 655(b), to adopt "the most cost-effective protective measures capable of reducing or eliminating significant risk." *See* 58 Fed. Reg. 16,612, 16,614/3 (1993). The same principle should apply when, as in this case, OSHA issues an occupational health standard under section 6(b)(5), 29 U.S.C. § 655(b)(5).

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[3] The congressional mandate that OSHA adopt a bloodborne pathogens rule (Pub. L. No. 102-170, § 100, 105 Stat. 1113) has no effect on this case. Congress ordered OSHA to adopt a rule, *not this rule*. The congressional mandate does not change the standard of review. *Cf. Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 45 (even unequivocal congressional ratification – short of statutory incorporation – would not change the standard of review for agency action).

II. The Court Should Grant The Petition To Resolve The Split In The Circuits Concerning OSHA's Authority To Combine Discrete Industry Groups And Toxic Agents When Determining Whether Workers Are Exposed To A Significant Risk.

By citing *Associated Builders & Contractors, Inc. v. Brock*, 862 F.2d 63, 68 (3d Cir. 1988), *cert. denied*, 490 U.S. 1064, 1065 (1989), and 494 U.S. 1003 (1990), Respondents confirm the split among the Circuits concerning OSHA's authority to make a universal assessment of the risks presented by numerous physical agents to workers in divergent industries. The *Associated Builders* opinion, like the Court of Appeals' majority opinion in this case, cannot be squared with the decisions in *AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992), and *International Union, UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991). This issue will recur in future OSHA rulemaking proceedings. The Court should grant the ADA's petition to resolve the issue.[4]

By attempting to distinguish the Eleventh Circuit's decision in *AFL-CIO v. OSHA*, 965 F.2d at 962, Respondents support the ADA's argument (Pet. 11-12) that

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[4] Respondents contend that OSHA gave specific consideration to the risks in dental settings, citing evidence concerning dental health care workers' risk of acquiring hepatitis B. Opp. 7 n.6. That evidence predates the CDC guidelines and does not take into consideration increasing use of the HBV vaccine, which was not available until the early 1980s.

Respondents also quote OSHA's unsupported assertion that dental health care workers "are continually exposed to blood and bloody saliva during almost all dental procedures." Opp. 7. Uncontradicted evidence in the record demonstrates that nearly half of all patient visits expose dental health care workers to saliva without blood. Record Ex. 58.

OSHA improperly lumped together HBV, HIV, and other pathogens for purposes of evaluating the risk to workers. Respondents correctly describe the Eleventh Circuit's holding "that OSHA, in promulgating a multi-substance standard, had not adequately demonstrated significant risk for each substance." Opp. 17. That holding also applies to this rulemaking, in which OSHA did not find that HIV, syphilis, or any pathogen other than HBV posed a significant risk to workers.

Respondents concede that OSHA designed the blood-borne pathogens rule to protect workers from all pathogens. Opp. 2. That is why OSHA required workers who have been vaccinated against HBV to wear personal protective equipment, use care in the handling of laundry and waste, etc. App. 94a. Those requirements cannot be justified by the insignificant residual risk to vaccinated workers.

III. The Court Should Grant The Petition To Clarify The Burden Of Proof And Standard Of Review In OSHA Rulemaking Proceedings, Which The Court Of Appeals Grossly Misapplied.

Respondents defend the Court of Appeals' majority opinion by arguing that OSHA's findings are entitled to deference when they involve issues on the frontier of scientific knowledge. Opp. 21. The majority opinion, however, identified errors that have nothing to do with science, such as OSHA's failure to consider the adverse impact the final rule will have on patient care. Pet. App. 6a, 9a-10a. Each time the majority opinion identified an error by OSHA, the majority deferred to OSHA because

the ADA did not "quantify" the magnitude of OSHA's mistakes. *Id.* That approach improperly shifts the burden of proof to industry and dilutes the standard of review to the point that it is virtually meaningless.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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